

STATEMENT
OF
MARGARET A. GARVIN, ESQ.
DIRECTOR OF PROGRAMS
NATIONAL CRIME VICTIM LAW INSTITUTE

BEFORE
THE
CONSTITUTION SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON THE IMPLEMENTATION OF THE
*SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON,
LOUARNA GILLIS, NILA LYNN CRIME VICTIMS RIGHTS ACT
(TITLE 1 OF THE JUSTICE FOR ALL ACT)*

JUNE 21, 2006

Mr. Chairman and Distinguished Members:

Thank you for holding this hearing today. I am grateful for the invitation to present the views of the National Crime Victim Law Institute (NCVLI) on the current status of the implementation of the Crime Victims' Rights Act (CVRA).

NCVLI is a national resource for the advocacy of crime victims' rights and provides support to legal clinics across the country established by the Congress and the Office for Victims of Crime in the Department of Justice. I joined NCVLI in February of 2003. As the Director of Programs, I provide programmatic oversight to each of NCVLI's victims' rights programs, including the *pro bono* clinical project funded by Congress through the

Office for Victims of Crime. Part of my work includes writing of *amicus curiae* briefs to courts around the country and providing legal technical assistance to attorneys representing crime victims nationwide. Prior to joining NCVLI, I clerked for the Honorable Donald P. Lay of the Eighth Circuit Court of Appeals and then practiced in a law firm in Minneapolis, Minnesota.

When President Bush signed the Crime Victims' Rights Act into law in October of 2004 a new era of federal victims' rights began. The CVRA moved largely symbolic, unenforceable, aspirations for the better treatment of crime victims that were buried within Title 42 of the United States Code into the light of Title 18 and converted them into enforceable rights.

The CVRA was born of the failure of the Congress to pass and refer to the States the proposed Crime Victims' Rights Amendment to the United States Constitution. Critics of the proposed amendment often said they were "all for victim's rights," but always added that the rights did not need to be in the Constitution. Their position was that statutes would suffice to secure for victims the justice and due process they sought. The CVRA was intended, in part, to test this claim.

In addition to creating new, enforceable rights, Congress authorized the appropriation of money to ensure victim access to enforcement mechanisms. Specifically, in the CVRA Congress authorized the appropriation of money for the operation of free legal clinics so that crime victims could obtain legal services to effectively and vigorously assert and enforce their rights in the courts.

Approximately 20 months have passed since passage of the law; the Department of Justice has issued revised Attorney General Guidelines which conform to the requirements of the new law; the Attorney General has recently appointed an Ombudsman to review and consider compliance

issues within the Department of Justice, as required by the law; law review articles have been published regarding the CVRA; and the Federal courts have issued 25 opinions construing the new law. Now is an appropriate time to stop and consider the initial impact of the CVRA, and to evaluate the effect of these efforts.

I will address two points. First, the case law to date demonstrates that the rights in the CVRA are accorded a lesser respect and deference by the courts than constitutional rights. The result is a continued treatment of victims as interlopers on the criminal justice system. Second, there is a clear and present need for the Congress to appropriate funds up to its authorization level if the new rights are to be fairly tested in a full and fair way within the adversary process that is our criminal justice system.

First, the cases. NCVLI's review of the Federal cases available through electronic legal research that have discussed the CVRA reveals that as of the end of May of this year, 25 cases have issued from Federal trial and appellate courts. The citation to each of these cases can be found at the end of this statement. Of these 25 cases, only three have issued from the federal appellate courts, which is where the true contours of the CVRA will be determined.

Two cases are particularly revealing of the courts' continuing treatment of victims' rights as lesser rights. First, a trial court decision that is perhaps the most dismissive of victims' rights and disrespectful of the CVRA – *United States v. Holland*.¹ In *Holland*, an offender filed a petition objecting to the restitution portion of the sentence. The court held that, nine years after sentencing, it retained jurisdiction to alter the restitution obligation entered pursuant to the Victim Witness Protection Act. In

¹ 380 F. Supp.2d 1264 (N.D. Ala. 2005)

conclusion, while addressing the ramification of its decision, the court stated that if the victim “believes that . . . the new, mushy, ‘feel good’ statute with the grand title ‘Crime Victims’ Rights,’ abrogated [*United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993) which held that restitution was penal] by including among victims’ ‘rights’, ‘the right to full and timely restitution as provided by law, the [victim] may, of course, mount an appeal from the order of June 11, 2005.”² This callous language acts as a simple reminder of why clear crime victims’ rights, backed with the ability the crime victim to seek enforcement, are necessary.

A second opinion demonstrates a more substantive threat to the enforceability of the CVRA – *In re W.R. Huff Asset Mgmt. Co., LLC*.³ In *W.R. Huff*, the Second Circuit Court of Appeals noted in *dicta* that “[m]ost of the rights provided to the crime victims under the CVRA require an assessment of ‘reasonableness.’”⁴ From this the court concluded that the proper standard of review for the rights was an abuse of discretion standard. While the court was correct that 5 of the 8 delineated rights in the CVRA include some form of the word “reasonable,” the leap to the court’s conclusion is disturbing. If the rights provided by the CVRA are subject to an abuse of discretion standard than victims’ rights in this country will continue to be subject to the whims and capricious interpretation of each trial court judge, including the judge who described the CVRA as “the new, mushy, ‘feel good’ statute with the grand title ‘Crime Victims’ Rights.’” The result – victims’ rights will once again be rendered illusory, instead of enforceable as Congress intended.

²*Id.* at 1278

³ *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005).

⁴ *Id.* at 563.

There is one Ninth Circuit case that has recognized and given meaning to Congress' intent that the CVRA make crime victims participants in the system. In *Kenna v. District Court*,⁵ the victim, Patrick Kenna, was denied by the District Court the ability to exercise his CVRA right to be reasonably heard at the sentencing proceeding of the second of two men who criminally defrauded him. When Mr. Kenna, unrepresented by counsel tried to speak, the district court denied him that opportunity stating, "I don't think there's anything that any victim could say that would have any impact whatsoever." After retaining counsel, Mr. Kenna filed a writ of mandamus. Noting that the CVRA sought to ensure that crime victims were no longer treated "like good Victorian children – seen but not heard," the Ninth Circuit upheld the victim's right and remanded the case. On remand, and upon motion by Mr. Kenna through counsel, the District Court vacated the sentence to allow the victim to exercise his right.

When one considers these cases, and the other cases issued to date, it is clear that courts are affording the rights provided by the CVRA a lesser status and lesser respect than that afforded constitutional rights. The net result is that courts are continuing to view crime victims as a type of trespasser on the criminal justice system.

My second point – If the rights provided by the CVRA are to be truly and fairly tested in the courts and the claim of the critics of the proposed victims' rights amendment be properly tested, Congress must fully fund the authorizations made under the CVRA.

The CVRA authorized funding for a number of enforcement and implementation programs. Among these authorized appropriations -- \$7,000,000 for fiscal year 2005 and \$11,000,000 for each of the fiscal

⁵ *Kenna v. District Court*, 435 F.3d 1011 (9th Cir. 2006).

years 2006-2009, to the Office for Victims of Crime “to support organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims’ rights in Federal jurisdictions, and in the States and tribal governments that have laws substantially equivalent” to the CVRA. So far just short of two million has been appropriated out of the initial \$7,000,000. The importance of this disparity should not be overlooked.

As an example I turn again to the *Kenna* case. When Mr. Kenna sat in the gallery at the sentencing of his offender, he was not represented by counsel. Unrepresented he stood and tried to assert his right to be heard. He was, in essence, told by the court to sit down. Following sentencing, Mr. Kenna secured *pro bono* counsel and that counsel was able to navigate the procedural maze of our court system and file a mandamus action to the Ninth Circuit Court of Appeals within the short 10 day required time frame. Despite the CVRA’s requirement that appellate courts “take up and decide such application forthwith within 72 hours,” the Ninth Circuit did not rule on the petition for months. Instead, counsel for Mr. Kenna had to file a subsequent pleading with the court urging action. Then nearly 8 months after filing the petition, counsel for Mr. Kenna participated in oral argument before the Ninth Circuit. All of this legal work led to the one and only appellate court decision that has interpreted the CVRA positively. The case stands as a clear example of the importance of victims having counsel.

NCVLI urges Congress to appropriate the remaining amounts available so that more victims like Mr. Kenna can have their day in court, and so that the theory that a strong statute with enforceable rights can adequately be tested.

Thank you. I will gladly take any questions.

**ELECTRONICALLY AVAILABLE CASES CITING THE CRIME VICTIMS'
RIGHTS ACT, 18 U.S.C. § 3771, AS OF MAY 2006**

- 1) *In re Kari Ann Jacobsen*, Case No. 05-7086, 2005 Lexis 13990 (D.C. July 8, 2005) (unpublished opinion).
- 2) *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005).
- 3) *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006).
- 4) *United States v. Blumhagen*, No. 03-CR-56S, 2006 US Dist. Lexis 15380 (W.D.N.Y. 2006) (unpublished opinion).
- 5) *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047 (N.D. Cal. 2005).
- 6) *United States v. Croteau*, No. 05-CR-30104-DRH, 2006 U.S. Dist. Lexis 23684 (S.D. Ill. 2006) (unpublished opinion).
- 7) *United States v. Dengenhardt*, 405 F. Supp. 2d 1341 (D. Utah Dec. 21, 2005).
- 8) *United States v. Eight Automobiles with Fraudulently Obtained Ohio and New York State Division Of Motor Vehicle Titles*, 356 F.Supp.2d 223 (E.D.N.Y. 2005).
- 9) *United States v. Guevara-Toloso*, No. M 04-1455, 2005 WL 1210982 (E.D.N.Y. May 23, 2005) (unpublished opinion).
- 10) *United States v. Holland*, 380 F.Supp.2d 1264 (N.D. Ala. 2005).
- 11) *United States v. Ingrassia*, 2005 WL 2875220, No. CR-04-0455ADSJO (E.D.N.Y. Sept. 7, 2005).
- 12) *United States v. Ingrassia*, 392 F. Supp. 2d 493 (E.D.N.Y. 2005).
- 13) *United States v. Johnson*, 362 F.Supp.2d 1043 (N.D. Iowa 2005).
- 14) *United States v. Kaufman*, ___ F. Supp. 2d ___, 2005 WL 2648070 (D. Kan. Oct. 17, 2005).
- 15) *United States v. L.M.*, ___ F. Supp. 2d ___, 2006 WL 855806 (N.D. Iowa March 31, 2006).
- 16) *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).

- 17) *United States v. McDaniel*, 411 F. Supp. 2d 1323 (D. Utah 2005).
- 18) *United States v. Serawop*, 409 F. Supp. 2d 1356 (D. Utah 2006).
- 19) *United States v. Shelton*, No. 03:02-264, 2006 WL 1094269 (D.Colo. 2006) (unpublished opinion).
- 20) *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005) (unpublished opinion).
- 21) *United State v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).
- 22) *United States v. Visinaiz*, 344 F.Supp.2d 1310 (D. Utah 2004).
- 23) *United States v. W.R. Grace*, 401 F.Supp.2d 1057 (D. Montana 2005).
- 24) *United States v. W.R. Grace*, 408 F.Supp.2d 998 (D. Montana 2005).
- 25) *United States v. Wilson*, 350 F.Supp.2d 910 (D. Utah 2005).